PERDANA PARKCITY SDN BHD v. GOVERNMENT OF MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ROZANA ALI YUSOFF J
[CIVIL SUIT NO: WA-21NCVC-10-02-2016]
30 SEPTEMBER 2021

Abstract – *The express intention of the parties in the development order was for the developer to surrender for free to the Government the impugned lands for public schools, which later did not materialise. Such representation created a legitimate expectation that the impugned lands would not be used for any other purpose, thus it is reasonably expected that the Government would return the impugned lands to the developer as the underlying purpose in providing the impugned lands is no longer applicable.*

LOCAL GOVERNMENT: *Local authority – Land dispute – Developer surrendered lands for free to Government to be used to for public schools – Discovery that impugned lands no longer used for purpose of Government schools but for commercial purposes – Whether developer entitled to return of impugned lands based on legitimate expectation – Whether there was fraud, unjust enrichment and misfeasance of tort in public office*

LAND LAW: *Housing developer – Land dispute – Developer surrendered lands for free to Government to be used to for public schools – Discovery that impugned lands no longer used for purpose of Government schools but for commercial purposes – Whether developer entitled to return of impugned lands based on legitimate expectation – Whether there was fraud, unjust enrichment and misfeasance of tort in public office*

The plaintiff was seeking against the defendant, *inter alia* (i) the lands it surrendered for free to the first and second defendants remain as schools for the benefit of the residents of the plaintiff's development; or (ii) alternatively, the return of the lands it surrendered for free to the first and second defendants in return for payment of reasonable compensation by the plaintiff. The plaintiff was the developer of Desa Parkcity and was the registered proprietor of some lands. At the material time, the plaintiff intended to develop the lands as a mixed development known as 'Desa Parkcity' ('DPC') and submitted an application to Dewan Bandaraya Kuala Lumpur ('DBKL') where the original layout plan was approved by DBKL for the construction of 13,112 residential units. In return of the approval of the original layout plan, the plaintiff was required to surrender three parcels of land to the first defendant to be used as public schools *ie*, School Site 1, School Site 2 and School Site 3. Subsequently, the plaintiff applied to amend the approved layout plan with DBKL with the intention to reduce the number of

residential units to be built on the DPC which was approved ('amended plan'). Following the reduction of the density, School Sites 2 and 3 were no longer required for Government schools because School Site 1 was sufficient to serve the DPC community and surrounding residents. The School Sites 2 and 3 ('impugned lands') were now the subject matter of this suit. Due to the changes in the usage, the plaintiff had, on numerous occasions, applied and appealed to both the first defendant and the third defendant for the release and re-alienation of the impugned lands. The plaintiff submitted applications to the third defendant for the re-alienation of the impugned lands but was rejected on the ground that the first defendant was still intending to construct schools. The plaintiff then discovered that the impugned lands were no longer required for schools and, by that time, the impugned lands were alienated to the second defendant as registered proprietor. As such, the plaintiff made several proposals to the first and second defendants to enter into a public-private partnership project for the return of the impugned lands, but the first and second defendants never responded to the plaintiff's proposals. The plaintiff decided to submit a fresh proposal to the first defendant to which the plaintiff was prepared to build PPIAM residences within DPC for the first defendant in exchange for the impugned lands. The plaintiff's application to Unit Kerjasama Awam Swasta ('UKAS') of the Prime Minister's Department was rejected on the ground that the impugned lands would be involved in a land swap exercise to facilitate a privatisation project with a third party, Tiara Legend Development Sdn Bhd ('TLD'). This prompted the plaintiff to file this action. The issues that arose were (i) whether the plaintiff was entitled for the return of the impugned lands based on a legitimate expectation because the lands were no longer used for the purpose of Government schools but were used for the purpose of commercial and profit-driven with a third party; and (ii) whether there were fraud, unjust enrichment and misfeasance of tort in public office by the defendants in respect of the land swap involving the impugned lands.

Held (allowing plaintiff's claim in the alternative for return of impugned lands):

(1) The request for the return of the impugned lands by the plaintiff, if acted upon by the defendant, would not invoke a breach of any law or statute. From the onset, the parties' intentions were clearly seen in the development order, specifically under cls. 1.11 and 1.12 issued by DBKL, where there was an express term that the plaintiff was required to surrender the impugned lands for schools. There was sufficient evidence including details of letters from the defendants that the plaintiff, since 2004 till 2015, had applied several times for the return of the impugned lands but the defendant consistently refused to return the impugned lands to the plaintiff on the premise that the impugned lands were still required for schools despite there being changes to the DPC's layout plan. Taking into account the representation made by the

parties, it was clear that the express intention of the parties was for the sole purpose of building schools on the impugned lands which later did not materialise. Such representation had created a legitimate expectation that the impugned lands would not be used for any purpose other than schools. (paras 22-25)

(2) It is the policy of the Government that schools are to be built in DPC to serve and provide benefits to the resident and the neighbourhood. In fact, without the surrender of the impugned lands for free, the plaintiff would not have been able to secure the necessary approvals to develop DPC. The plaintiff had surrendered the impugned lands and was accepted by the defendants where all the processes were done in accordance with the requirement of the law, *ie*, National Land Code. Since there had been a change in such policy that the impugned lands were no longer required for schools, it was procedurally fair for the defendants to inform the plaintiff of such changes and reason thereof. For this, fairness and justice were wholly in harmony with the rule that the law should not allow one to take advantage; *vis-à-vis,* the impugned lands were only intended to be used as schools and not for any commercial transactions which would reasonably be profited by the defendants. On the other hand, the defendants did not adduce any evidence to show why and when the impugned lands were no longer required for schools. (paras 27-30)

(3) The representation of the defendant had created a reasonable and legitimate expectation that the impugned lands were not to be used for any other purpose except for schools and the benefit of the DPC and its surrounding neighbourhood. The legitimate expectation that the impugned lands would be returned upon request if it were no longer to be used to serve the original purpose, in this court's view, such expectation did not override the express statutory powers vested in the authorities or such request did not confine to any law. It was reasonably expected that the first defendant would return the impugned lands to the plaintiff as the underlying purpose in providing the impugned lands was no longer applicable. Thus, the plaintiff had, rightly, a legitimate expectation that there would be observance of procedural fairness accorded to them. (paras 30-32)

(4) The plaintiff had fulfilled all the requirements enunciated by the Privy Council. The requirement of surrendering the impugned lands for free was lawfully executed by the plaintiff to the defendants for the building of schools. Such an act was done for the defendants with the aim to benefit the residents of DPC. The surrender of the impugned lands was necessary for the plaintiff to secure the approvals to develop DPC in that such an act is definitely not intended to be done gratuitously. Lastly, the act must be such that the other person enjoys the benefit of the act or

the delivery. In this aspect, one of the three surrendered lands was actually used for construction of a school and the value for the impugned lands was substantially enhanced. (para 38)

(5) The burden of proof rests on the plaintiff to prove that there was a profit-driven and commercial arrangement by the second defendant and/or the third defendant with TLD. The decision to enter into a land exchange project with TLD for commercial purposes was not made by either the second defendant or the third defendant. All the decisions were made by the UKAS under the Prime Minister's Department which was based on the policy determined by the Cabinet. In the absence of evidence, the plaintiff had failed to prove that there were arrangements by the second or third defendants with TLD in respect of a profit-based and commercial arrangement which was said to have unjustly enriched the defendants. Furthermore, TLD was not brought as party to this suit. (para 40)

(6) The discussion or determination of the conditions for the surrender of the impugned lands was only between the plaintiff and DBKL. Thus, the question of whether the defendants had made any representations or warranties before the plaintiff surrendered and re-alienated the impugned lands to the third defendant never arose. As to the allegation of fraud, s. 4 of the Government Proceedings Act 1956 ('GPA') expressly excludes the direct liability of the Government of Malaysia in a tort-based cause of action. Liability to the Government of Malaysia in the cause of tort action only involves vicarious liability. The provisions of s. 5 of the GPA clearly place the responsibility of the Government vicariously for the conduct of Government officers. However, the provision is subject to the provisions of s. 6(1) of the GPA which lay down prerequisites for the Government's vicarious liability against the actions of Government officials. The same action should be taken against Government officials who commit such acts in person. In other words, the Government official who committed the tort must also be summoned/named in the summons and proved negligent. (paras 43 & 44)

(7) The plaintiff failed to comply with the provisions of the law whereby the plaintiff did not or failed to name the officer responsible and to disclose the cause of action against any defendant. Allegations of fraud against the defendant could not be proven without complying with the provisions of the GPA. The burden of proof rested on the plaintiff to prove against the elements of fraud committed by any public officer named as a party in this action. It was clear from the evidence adduced; no fraudulent conduct was successfully proved against any of the defendants as alleged in the plaintiff's pleading. The plaintiff also failed

to prove that the decisions made in dismissing the plaintiff's applications were wrongfully made by abusing their administrative powers and functions against the plaintiff's. (paras 45-47)

(8) Since it was decided on the premise that the impugned lands were no longer to be used for public and social purposes, the plaintiff's claim in the alternative, for the return of the impugned lands, was allowed. (para 48)

Case(s) referred to:

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2021] 6 CLJ 1 FC ***(refd)***
Fibrosa Spolk Akeyjna v. Fairbairn Law Son Combe Barboer Ltd [1943] AC 32 ***(refd)***
Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors [2017] 6 CLJ 161 CA ***(refd)***
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Majlis Bandaraya Pulau Pinang v. Datin Noorzaina Mat Zain & Anor [2019] 4 CLJ 36 CA ***(refd)***
New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation) [1986] 1 LNS 30 SC ***(refd)***
Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors [2021] 2 CLJ 808 CA ***(refd)***
Ridge v. Baldwin [1964] AC 40 ***(refd)***
Robert Lee & Anor v. Wong Ah Yap & Anor [2007] 4 CLJ 1 FC ***(refd)***
Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] 1 LNS 161 PC ***(refd)***
Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***
Wong Yoon Chai v. Lee Ah Chin [1980] 1 LNS 132 FC ***(refd)***
YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor [2021] 8 CLJ 179 FC ***(refd)***
Zakiah Ishak v. Majlis Daerah Hulu Selangor [2005] 4 CLJ 77 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 71
Federal Constitution, arts. 5(1), 8(1)
Government Proceedings Act 1956, ss. 4, 5, 6(1)
National Land Code, ss. 92, 204D
Rules of Court 2012, O. 18 r. 19, O. 53

For the plaintiff - M/s Lim Kian Leong & Co
For the defendants - Jabatan Peguam Negara Malaysia

Reported by Suhainah Wahiduddin

JUDGMENT

Rozana Ali Yusoff J:

Introduction

[1] The plaintiff is seeking against the defendants, *inter alia*, as follows:

(i) the lands it surrendered for free to the first and second defendants remain as schools for the benefit of the residents of the plaintiff's development; or

(ii) alternatively, the return of the lands it surrendered for free to the first and second defendants in return for which the plaintiff is willing to pay to the first and second defendants reasonable compensation.

[2] However, the plaintiff in their submission submitted that they are not seeking for monetary damages notwithstanding the fact the lands were surrendered for free to build schools. At all material times, the plaintiff has never relinquished its proprietary rights (either in law or in equity) on the lands.

Background Facts

[3] The plaintiff is the developer of Desa ParkCity and was the registered proprietor of lands known as Lots 48572 to 48589 all situated in the Mukim of Batu measuring approximately 439 acres.

[4] At that material time, the plaintiff intended to develop the lands as a mixed development known as "Desa ParkCity" ("DPC") and submitted an application to Dewan Bandaraya Kuala Lumpur ("DBKL") where the original layout plan was approved by DBKL on or about 18 May 2001 for the construction of 13,112 residential units. In return of the approval of the original layout plan, the plaintiff was required to surrender three parcels of land to the first defendant to be used as public schools. The three parcels of land are as follows:

(i) School Site 1 (one secondary school and one primary school);

(ii) School Site 2 (one secondary school, one primary school and one kindergarten); and

(iii) School Site 3 (one primary school and one kindergarten).

[5] On or about year 2004, the plaintiff applied to amend the approved layout plan with DBKL with the intention to reduce the number of residential units to be built on the DPC from 13,112 units to 6,811 units which were approved on 28 August 2004 (amended plan). Following the reduction of the density, School Sites 2 and 3 were no longer required for Government schools because School Site 1 is sufficient to serve the DPC community and surrounding residents. The School Sites 2 and 3 (impugned lands) are now the subject matter of this suit.

[6] For the purpose of clarity, the third defendant allocated the following provisional lot numbers for the impugned lands:

(i) School Site 2 (Lot No. 62181 (previously known as PT 17495) and Lot No. 62182 (previously known as PT 17496); and

(ii) School Site 3 (Lot No. 61955 (previously known as PT17456) and Lot No. 61956 (previously known as PT 17455).

[7] The third defendant then issued individual and separate titles for Lot 62181 and Lot 61955 to which these titles have been registered in the name of the second defendant pursuant to the provisions of the Federal Lands Commissioner Act 1957. The title particulars for these two lots are Lot 62181 (GRN 73359) and Lot 61955 (GRN 73364) where both are situated in the Mukim of Batu, Daerah Kuala Lumpur. The parcels under Lot 62182 (GRN 73359) and Lot 61956 (GRN 73364) are now the Federal lands.

[8] Due to the changes in the usage, the plaintiff has on numerous occasions applied and appealed to both the first defendant and the third defendant for the release and re-alienation of the impugned lands. On or about April 2015, the plaintiff submitted applications to the third defendant for the re-alienation of Lot 62182 and also Lot No. 61956 but was rejected on the ground that the first defendant was still intending to construct schools.

[9] On or about 2013, the plaintiff discovered that the impugned lands were no longer required for schools and by that time, the impugned lands were alienated to the second defendant as registered proprietor. As such, the plaintiff made several proposals to the first and second defendants to enter into a public-private partnership project for the return of the impugned lands, but the first and second defendants never responded to the plaintiff's proposals.

[10] On 5 June 2015 the plaintiff decided to submit a fresh proposal to the first defendant to which the plaintiff was prepared to build PPIAM residences within DPC for the first defendant in exchange for the impugned lands. On 5 January 2016, the plaintiff's application to Unit Kerjasama Awam Swasta ("UKAS") of the Prime Minister's Department was rejected on the ground that the impugned lands will be involved in a land swap exercise to facilitate a privatisation project with a third party which later the plaintiff discovered a company named as Tiara Legend Development Sdn Bhd ("TLD"). This has prompted the plaintiff to file this action.

Agreed Issues To Be Tried

[11] Both parties filed the agreed issues as follows:

(i) Whether the second defendant and the third defendant can conduct any dealings on the impugned lands as the administrators following the needs and policies of the defendants from time to time or whether the plaintiff has the right in law and equity to obtain the transfer or re-alienation of the impugned lands from the second defendant and taking into account the impugned lands:

   (a) the impugned lands were surrendered and re-alienated by the plaintiff to the third defendant in line with the provisions of s. 204D of the National Land Code ("NLC");

A (b) the impugned lands were then registered to the second defendant by the third defendant; and

(c) the said lands were/are not used for a public and social purpose.

(ii) Whether the second defendant and/or the third defendant have made an
B express and/or implied representation and warranty and committed fraud on the plaintiff and the plaintiff believed that the impugned lands would only be used for public and social purposes:

(a) before the plaintiff surrendered and re-alienated the said lands to the third defendant.

C (b) after the plaintiff surrendered and re-alienated the said lands to the third defendant.

(iii) Whether the conduct of the second defendant and/or the third defendant involving the impugned lands in the privatisation project for the
D construction of three schools, namely, SK Jalan Hang Tuah, SMK Taman Intan Baiduri and SMK Batu Muda by way of a land swap method with Tiara Legend Sdn Bhd is an act of fraud and is wrongful in law.

(iv) Whether the second defendant and/or the third defendant had abused its
E administrative powers and functions to the plaintiff by unlawfully rejecting the plaintiff's numerous applications for re-alienation or transfer of the impugned lands for the reason that the impugned lands were to be used for a social and public purpose.

(v) Whether there are rules based on the profit-driven and commercial
F arrangement by the third defendant and/or third defendant with Tiara Legend Development Sdn Bhd for the impugned lands that is tainted with fraud and/or illegality and was made in bad faith thereby unlawfully depriving the plaintiff's right to get back to the said impugned lands.

G (vi) Whether the officers of the defendants have committed the tort of misfeasance in public office in denying the plaintiff's lawful rights to get back the impugned lands and therefore, the first defendant is now vicariously liable.

H **[12]** However, the plaintiff did not adhere to the agreed issues instead based their submission on the followings:

(i) *Quasi*-contract relationship between the plaintiff and defendants and unjust enrichment arising from legitimate expectation.

(ii) A claim against the defendants under the principle of unjust enrichment.
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(iii) Fraud, illegality and abuse of process.

(iv) The land swap deal was awarded contrary to the first defendant's own policies and guidelines.

(v) Misrepresentation by the defendants.

(vi) Breach of legitimate expectation gives rise to a private law action against the defendants.

Analysis And Finding

[13] There are six agreed issues filed by the parties. However, the plaintiff submitted based on the issues of legitimate expectation, *quasi*-contract relationship, unjust enrichment, fraud, illegality and abuse of process of the land swap deal which was awarded contrary to the first defendant's own policies and guidelines. Having heard the submission by both parties, in my view, the issues to be determined are as follows:

(i) Whether the plaintiff is entitled for the return of the impugned lands based on a legitimate expectation because the lands were no longer used for the purpose of Government schools but were used for the purpose of commercial and profit-driven with a third party.

(ii) Whether there were fraud, unjust enrichment and misfeasance of tort in public office by the defendants in respect of the land swap involving the impugned lands.

[14] I took cognisance that the defendant's application under O. 18 r. 19 Rules of Court 2012 ("ROC 2012") was unanimously set aside by the Court of Appeal (W-01(IM)(NCVC)-355-09-2016) with an order that the case to be remitted and heard in a full trial before another High Court Judge. Therefore, the initial submission by the defendant that the plaintiff is to avail themselves to the remedies for judicial review under O. 53 ROC 2012 is no longer to be dealt with. Furthermore, the plaintiff did not avail itself of any remedies under O. 53 ROC 2012 for judicial review when their applications were rejected. The plaintiff never intended to challenge the decision to use the impugned lands for schools but only sought the return of the impugned lands in the event that these lands were no longer to be used for schools.

[15] The plaintiff's claim is based on breach of legitimate expectation and representation and/or warranty by the first and third defendants. In this aspect the plaintiff has to surrender three parcels of land for free to the first defendant for the purpose of building schools in return for the approval of DPC. Therefore, according to the plaintiff, since the impugned lands were surrendered for free, there was a reasonable and legitimate expectation that the impugned lands would be only used as schools for the benefit of DPC and surrounding residents. It was never in the contemplation of the plaintiff and the defendants that the impugned lands would be used for any other purpose except for schools.

The First Issue: Whether The Plaintiff Is Entitled For The Return Of The Impugned Lands Based On A Legitimate Expectation Because The Lands Were No Longer Used For The Purpose Of Government Schools But Was For The Purpose Of Commercial And Profit-Driven With A Third Party

[16] At that material time, the plaintiff intended to develop the lands as a mixed development known as DPC and the impugned lands have been validly surrendered to the defendants under s. 204D of the NLC. As to date the impugned lands are registered under the second defendant on 5 August 2010 and also Federal lands.

[17] It was submitted by the defendant that the second defendant and the third defendant, as the administrators, can conduct any dealings on the impugned lands following the needs and policies of the defendants from time to time. Moreover, there is no specific requirement in law especially under s. 204D NLC for the defendant to comply with the express condition of the land as in the approved layout plan by DBKL. By virtue of individual titles being issued for the impugned lands, the second defendant was conferred an indefeasibility under s. 92 NLC. Since there are no restriction or express conditions on the category land use of the impugned lands, the defendants are at liberty in law to deal with the impugned lands in accordance with the policy and the requirements from time to time even though the initial purpose of re-alienation was not fulfilled.

[18] In addressing the first issue, it is pertinent for the court to examine the evidence that has led to the surrender of the impugned lands. The impugned lands were surrendered for free to the first defendant by the plaintiff solely to be used for schools to serve the residents of DPC.

[19] According to the plaintiff, the impugned lands ought to be used for Government schools but not for commercial and profit-driven purposes with a third party. On this score, the plaintiff submitted that the action of the defendants had affected the rights and the legitimate expectation of the plaintiff in that the impugned lands are no longer used to serve the purpose as it was originally being surrendered. In the event of a change of policy of the first defendant where the impugned lands are no longer required for schools, the plaintiff's request for the return of the impugned lands and to the extent that the plaintiff was even willing to compensate the defendants for the said return. Since there exists a reasonable and legitimate expectation, the plaintiff submitted that there is a *quasi*-contractual relationship between the plaintiff and the defendants in relation to the manner the impugned lands are to be used.

[20] The question here is: was there a legitimate expectation on the part of the plaintiff that the impugned lands are only to be used for schools. The claim of legitimate expectation is a claim derived from common law in equity. The rationale of invoking such a principle is to encourage good administration and to prevent abuses by decision-makers. Thus, in law for

legitimate expectation to arise there must be evidence of a promise or undertaking made by the parties to that effect. (See Federal Court case of *YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor* [2021] 8 CLJ 179 and Court of Appeal in *Zakiah Ishak v. Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77).

[21] I am also guided by the Court of Appeal in *Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors* [2017] 6 CLJ 161; [2017] 5 MLJ 116, that held as follows:

> [27] The general rule appears to be the doctrine of estoppel and legitimate expectation is not ordinarily available against the Government nor is the Government bound by any representation which may have been made expressly or by conduct which if needed to be acted upon would invoke a breach of statute. That position in law has been affirmed in Federal Court decision of *Government of the State of Negeri Sembilan & Anor v. Yap Chong Lan & Ors & Another Case* [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144; [1984] 2 MLJ 123 ...

[22] To my mind, the request for the return of the impugned lands by the plaintiff, if acted upon by the defendant would not invoke a breach of any law or statute.

[23] From the onset the parties' intentions are clearly seen in the development order, specifically under cls. 1.11 and 1.12 issued by DBKL dated 18 May 2001 where there was an express term that the plaintiff was required to surrender the impugned lands for schools.

Clauses 1.11 and 1.12 which read as follows:

> 1.11 Tapak-tapak bagi rezab sekolah, taman bandar, 'water body': kelab sukan, kemudahan sukan, rezab agama surau, klinik, tangki air, koridor pejalan kaki, pencawang pengagih utama hendaklah diukur dan diserahkan untuk tujuan-tujuan tersebut.
>
> 1.12 Tapak-tapak cadangan sekolah hendaklah dimajukan dan bangunan sekolah didirikan oleh pemaju dan kos pembinaannya akan dibayar balik oleh Kementerian Pendidikan. Pelan-pelan rekabentuk sekolah yang mematuhi kehendak-kehendak Kementerian Pendidikan hendaklah dikemukakan kepada Dewan Bandaraya Kuala Lumpur untuk kelulusan. Bangunan sekolah itu hendaklah disiapkan serentak dengan pembinaan rumah-rumah di skim ini.

[24] There are sufficient evidence including details of letters from the defendants before me that the plaintiff since 2004 till 2015 had applied several times for the return of the impugned lands but the defendant consistently refused to return the impugned lands to the plaintiff on the premise that the impugned lands were still required for schools despite there were changes of the DPC's layout plan. To manifest the reason of such refusal it can be seen in the letter dated 17 November 2008 issued by the

Ministry of Education to the third defendant and was carbon copied to the plaintiff for the purposes of intimating the decision made by the first defendant that the impugned lands were still required for schools at para. 4.

> 4. Berdasarkan asas-asas yang dikemukakan oleh pemaju, Kementerian ini telah mernpertimbangkan dan mengkaji semula keperluan sekolah di kawasan berkenaan dan mendapati tapak rezab masih diperlukan. Kementerian ini akan mengekalkan tanah tersebut bagi pembinaan SMK Desa Park City 2 seperti yang telah dirancang. Keputusan ini juga berdasarkan keperluan dan enrolmen sekolah di kawasan sekitar yang semakin padat seperti yang dinyatakan di dalam ulasan Jabatan Pelajaran Negeri (JPN) Wilayah Persekutuan Kuala Lumpur. Sesalinan surat daripada JPN Wilayah Persekutuan Kuala Lumpur disertakan untuk rujukan tuan:

[25] Taking into account of the representation made by the parties, it was clear that the express intention of the parties was for the sole purpose of building schools on the impugned lands which later did not materialise. In my view such representation has created a legitimate expectation that the impugned lands would not be used for any purpose other than schools.

[26] The evidence shows that on or about 2013, the impugned lands were alienated to the second defendant as registered proprietor and as it were no longer required for schools. Due to this position the plaintiff made several proposals to the first and second defendants to enter into a public-private partnership project for the return of the impugned lands but was rejected on the ground that the impugned lands were involved in a land swap agreement to facilitate a privatisation project with TLD.

[27] As submitted by the defendant that the second defendant and the third defendant can conduct any dealings with or without any express condition stated on the impugned lands as the administrators following the needs and policies of the defendants from time to time since there is no specific requirement in law especially under s. 204D NLC for the defendant to comply with the express condition of the land as in the approved layout plan by DBKL. To my mind, such dealing must be in all fairness and injustice taking into account the intention and purpose behind the surrender of the impugned lands by the plaintiff. It would be prudent to say here that it is the policy of the Government that schools are to be built in DPC to serve and provide benefits to the resident and the neighbourhood. In fact, it is safe to conclude here that without the surrender of the impugned lands for free, the plaintiff would not have been able to secure the necessary approvals to develop DPC.

[28] In principle, the rules of natural justice, in the broadest sense, are concerned with the duty to act fairly (see *Ridge v. Baldwin* [1964] AC 40 at p. 77). They form the procedural aspect of the rule of law. As noted by this court in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301 at p. 315,

procedural fairness is incorporated in arts. 5(1) and 8(1) of the Federal Constitution. (see Federal Court in *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2021] 6 CLJ 1).

[29] I am mindful the Federal Court in *Robert Lee & Anor v. Wong Ah Yap & Anor* [2007] 4 CLJ 1, that held:

> It is true that the courts, through its decisions try to arrive at a "fair and just" result. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice.

[30] The plaintiff has surrendered the impugned lands and was accepted by the defendants where all the processes were done in accordance with the requirement of the law, *ie*, NLC. Since there had been a change in such policy that the impugned lands were no longer required for schools, to my mind, it is procedurally fair for the defendants to inform the plaintiff of such changes and reason thereof. For this, fairness and justice are wholly in harmony with the rule that the law should not allow one to take advantage; *vis-à-vis,* the impugned lands were only intended to be used as schools and not for any commercial transactions which would reasonably be profited by the defendant. On the other hand, the defendants did not adduce any evidence to show why and when the impugned lands were no longer required for schools.

[31] In *Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors* [2021] 2 CLJ 808; [2021] 3 MLJ 1, the Court of Appeal held:

> [113] The absence of an express provision in any statute requiring the decision-maker to give reasons does not mean that the duty does not exist unless and until the statute specifically states so. Even then, the case law has developed progressively to instil an innate will on public authorities to explain their decisions. The Federal Court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd.* categorically held that 'The absence of such a provision ought not to be regarded as a cloak under which the decision-maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large'.

[32] Based on the evidence, it is clear to my mind that the representation of the defendant has created a reasonable and legitimate expectation that the impugned lands were not to be used for any other purpose except for schools and the benefit of the DPC and its surrounding neighbourhood. The decision of not building extra schools as planned and the land swap are policy decisions which I am mindful and very careful of in exercising my judicial function. The legitimate expectation that the impugned lands to be returned upon request if they no longer to be used to serve the original purpose, in my view, such an expectation did not override the express statutory powers vested in the authorities or such request is not confined to any law. It is reasonably expected that the first defendant will return the impugned lands

to the plaintiff as the underlying purpose in providing the impugned lands is no longer applicable. Thus, the plaintiff has, rightly, a legitimate expectation that there will be observance of procedural fairness accorded to them, that the appellant will act fairly by taking into consideration all relevant factors. (See Court of Appeal in *Majlis Bandaraya Pulau Pinang v. Datin Noorzaina Mat Zain & Anor* [2019] 4 CLJ 36).

[33] With this legitimate expectation, the next question is whether there is a *quasi*-contractual relationship between the plaintiff and the defendants in relation to the manner the impugned lands are to be used. Is the plaintiff entitled to claim against the defendant pursuant to s. 71 of the Contracts Act 1950 ("CA"):

> Section 71 CA provides the basis for a restitutionary claim as follows:
>
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect thereof, or to restore, the thing so done or delivered.

[34] The court must also consider whether in all circumstances the surrender of the impugned lands was done in good faith; "The question that must necessarily be decided is whether in all circumstances of this particular case it is proper to order restitution" (see *Wong Yoon Chai v. Lee Ah Chin* [1980] 1 LNS 132; [1981] 1 MLJ 219).

[35] The Supreme Court in *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1986] 1 LNS 30; [1987] 2 MLJ 57 in quoting the English decision of *Fibrosa Spolk Akeyjna v. Fairbairn Law Son Combe Barboer Ltd* [1943] AC 32 stated at p. 64:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money off or some benefit claimed from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called *quasi* contract of restitution.

[36] The Privy Council in the leading case of *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161; [1967] 1 MLRA 53, held that for a claim under s. 71 to succeed, it must be shown that the doing of the act or the delivery of the thing:

(i) must be lawful;

(ii) must be done for another person;

(iii) must not be intended to be done gratuitously; and

(iv) must be such that the other person enjoys the benefit of the act or the delivery.

[37] The Court of Appeal in *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002 held that:

> (1) Section 71 of the CA is the statutory embodiment of the common law principle of *quantum meruit*, which provides for a just compensation as the measure of the work done as opposed to contractual damages. Liability under s. 71 is not based on any existing contract between the parties. Rather, it is based on equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party. The submission that there is no obligation on the part of the plaintiff to pay the defendant for the structure work done because there was no privity of contract between the parties does not hold any water.

[38] From the evidence before me, I find that the plaintiff has fulfilled all the four requirements enunciated by the Privy Council. The requirement of surrendering the impugned lands for free was lawfully executed by the plaintiff to the defendant for the building of schools. Such an act was done for the defendants with the aim to benefit the residents of DPC. The surrender of the impugned lands was necessary for the plaintiff to secure the approvals to develop DPC in that such an act is definitely not intended to be done gratuitously. Lastly, the act must be such that the other person enjoys the benefit of the act or the delivery. In this aspect one of the three surrendered lands was actually used for construction of a school and the value for the impugned lands was substantially enhanced.

The Second Issue: Whether There Were Fraud, Unjust Enrichment And Misfeasance Of Tort In Public Office By The Defendants In Respect Of The Land Swap Involving The Impugned Lands

Unjust Enrichment

[39] The plaintiff submitted that the first and second defendants had been enriched by securing the impugned lands for free to use them for schools but later entered into a public-private partnership project. Therefore, it is unjust for the first and second defendants to use the impugned lands for a purpose other than schools since the value of the impugned lands has increased by the sole efforts of the plaintiff in making DPC a premier development in Malaysia. At all material times, the plaintiff never relinquished its rights on the impugned lands but as a matter of fact was misled by the first defendant that the impugned lands were still required for schools.

[40] The burden of proof rests on the plaintiff to prove that there is a profit-driven and commercial arrangement by the second defendant and/or the third defendant with TLD. The decision to enter into a land exchange project with TLD for commercial purposes was not made by either the second defendant or the third defendant. All the decisions were made by the UKAS under the Prime Minister's Department which is based on the policy determined by the Cabinet. In the absence of evidence, I find that the plaintiff

has failed to prove that there were arrangements by the second or third defendants with TLD in respect of a profit-based and commercial arrangement which is said to have unjustly enriched the defendants. Furthermore, TLD was not brought as party to this suit.

Fraud, Illegality And Abuse Of Process

[41] The plaintiff submitted that it is clear the powers of the first and second defendants were used in a manner tainted with fraud, illegality and abuse of process resulting in a denial of the plaintiff's lawful proprietary rights to the impugned lands. For reasons only known by the defendants, they refused to disclose any documents concerning the manner the land swap deal was negotiated and agreed upon by the first defendant and TLD. The defendants also presented their witnesses but have no actual knowledge on how and why the land swap deal and as to why the plaintiff's numerous proposals to the first defendant were never considered. The documents produced by the plaintiff are sufficient to connect the dots that there are reasonable inferences that fraud, illegality and abuse of process had been committed by the defendants.

[42] The defendant submitted that surrendering of the impugned lands was not made on the basis of instructions or applications or the representations or warranties of any of the defendants. It is clear from the evidence that the impugned lands were surrendered based on the fact that the plaintiffs have submitted an application to the DBKL to construct 13,112 housing units. The original layout plan was approved by DBKL on 18 May 2001 provided that the plaintiff must surrender the impugned lands for public use. The defendants have never issued the planning guidelines (community facilities) as alleged by the plaintiffs. For the Federal Territory of Kuala Lumpur, any application for planning permission is provided for by the Federal Territory (Planning) Act 1982 (Act 267) and not the Town and Country Planning Act 1976 (Act 172) and any guidelines for the Federal Territory of Kuala Lumpur for the purpose of planning application, if any, shall be issued by the DBKL.

[43] From the evidence, I am satisfied that the role of defendants prior to the surrender of the impugned lands has never arisen. The discussion or determination of the conditions for the surrender of the impugned lands was only between the plaintiff and DBKL. Thus, the question of whether the defendants had made any representations or warranties before the plaintiff surrendered and re-alienated the impugned lands to the third defendant never arose.

[44] As to the allegation of fraud, s. 4 of Government Proceedings Act 1956 ("Act 359") expressly excludes the direct liability of the Government of Malaysia in a tort-based cause of action. Liability to the Government of Malaysia in the cause of tort action only involves vicarious liability. The

provisions of s. 5 Act 359 clearly place the responsibility on the Government vicariously for the conduct and conduct of Government officers. However, the provision is subject to the provisions of s. 6(1) Act 359 which lays down prerequisites for the Government's vicarious liability against the actions of Government officials. The same action should be taken against Government officials who commit such acts in person. In other words, the Government official who committed the tort must also be summoned/named in the summons and proven negligent.

[45] In this instance the plaintiff has failed to comply with the provisions of the law whereby the plaintiff did not or failed to name the officer responsible and to disclose the cause of action against any defendant. Allegations of fraud against the defendants cannot be proven without complying with the provisions of Act 359. The burden of proof rests on the plaintiff to prove against the elements of fraud committed by any public officer named as a party in this action. It is clear from the evidence adduced; no fraudulent conduct was successfully proved against any of the defendants as alleged in the plaintiff's pleading.

[46] The Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 held that:

> (1) In any claim in tort against the government, the government officer who was responsible for the alleged tortious act must be made a party and his liability must be established before the government could be made vicariously liable as principal (ss. 5, 6 of the Government Proceedings Act 1956 ('GP')). It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needed to be established. It was only upon a successful claim against the officer personally could a claim be made against the government.

[47] The burden of proof rests on the plaintiff that there was an abuse of powers and administrative functions performed by any of the second defendant and third defendant named as parties in this action. Here I find that the plaintiff has failed to prove that the decisions made in dismissing the plaintiffs' applications were wrongfully made by abusing their administrative powers and functions against the plaintiffs.

Conclusion

[48] Based on the foregoing, I on the balance of probabilities find that the plaintiff has to prove its claim against the defendants. Since it was decided on the premise that the impugned lands are no longer be used for public and social purposes, I allowed the plaintiff's claim in the alternative for the return of the impugned lands as per para. 34(e) of the amended statement of claim with costs of RM80,000 subject to allocator.